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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RONALD B. MILLIGAN, JR., Defendant and Appellant.	B164587 (Los Angeles County Super. Ct. No. MA024326)

APPEAL from a judgment of the Superior Court of Los Angeles County. John P. Doyle, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters, Supervising Deputy Attorney General, and Richard T. Breen, Deputy Attorney General, for Plaintiff and Respondent.

Appellant Ronald B. Milligan, Jr. was convicted, following a jury trial, of two counts of committing a lewd act on a child under the age of 14 in violation of Penal Code section 288, subdivision (a). The trial court sentenced appellant to the upper term of eight years for count one, with a concurrent two-year term for count two.

Appellant appeals from the judgment of conviction, contending that the trial court erred in permitting the prosecution to redact his request for a polygraph test from the police report and in admitting evidence of an uncharged prior act of molestation by appellant pursuant to Evidence Code section 1108, and that section 1108 is unconstitutional. Appellant further contends that two witnesses improperly testified as to the victim's veracity and that his conviction is not supported by substantial evidence. We affirm the judgment of conviction.

Facts

On the afternoon of Saturday, April 6, 2002, eight-year-old Alyssa was at the home of her mother's sister Elizabeth. Elizabeth lived with appellant and their infant son in Lancaster. After Elizabeth went out to buy cigarettes, appellant asked Alyssa to come into his bedroom. She did. Appellant took off his clothes. Appellant asked Alyssa if she wanted to touch his penis. Alyssa later told police and a nurse that appellant made her put her hand on his penis. At trial, however, she stated that she did not touch his penis.

Appellant next pulled Alyssa's pants down and put his finger in her bottom. Alyssa said, "Ow," "Quit it," and "Don't do that." Appellant stopped. He wiped Alyssa's bottom with a t-shirt, then began rubbing his penis. He told Alyssa to go watch cartoons, and she did so.

When Elizabeth returned, she asked Alyssa if anything had happened while she was gone. Elizabeth told Alyssa that she had tape recorded what had happened, and played a tape for Alyssa. Alyssa heard "Ow," "Stop" and "Quit it" on the tape. Alyssa told Elizabeth that appellant asked her if she wanted to touch his penis, put his finger in her bottom and wiped her bottom with a t-shirt. Alyssa then returned to watching cartoons. Elizabeth apparently did nothing about the matter.

Late the next night, Elizabeth called Alyssa's mother, Sharon, and told her that Alyssa had something to tell her the next day when Sharon picked her up. Elizabeth would not explain further.

The next morning, Sharon learned from other relatives that Alyssa had told Elizabeth that appellant had put his finger in her bottom. Sharon met Alyssa at the home of Sharon's older daughter Carol and then called the Los Angeles County Sheriff's Department. Sheriff's Department personnel told her to take Alyssa to a hospital for an examination. She did. Afterwards, they returned to Carol's home and met with a sheriff's deputy, who interviewed Alyssa alone.

Detective Timothy O'Quinn interviewed Alyssa on April 10, 2002. She told him that when Elizabeth left the house, appellant called her into the bedroom. When she got there, appellant was naked. He took her hand and placed it on his penis. He then pulled down her pants and put his finger into her bottom. Next, appellant took a t-shirt and wiped her bottom. Appellant told Alyssa not to tell anyone. Alyssa told Detective O'Quinn that on a previous occasion, when she was seven, she was left alone with appellant and his seven-year-old daughter, Tianna, and appellant put his finger in her bottom and in Tianna's bottom. He wiped each girl's bottom with a t-shirt and asked them if they wanted to touch his penis. Alyssa said that she had not told anyone about the incident.[1]

Detective O'Quinn interviewed appellant, who said that he had been masturbating in his bedroom on Sunday, April 7, while Elizabeth was out of the house. Alyssa walked in. Appellant told her that what he was doing was nothing to be ashamed of. Alyssa watched for a while, then left the room. He denied touching Alyssa or causing her to touch him. A redacted tape of the interview was played for the jury.

In the course of his investigation, Detective O'Quinn learned that there might be an audiotape of the incident. He obtained a tape cassette from Elizabeth. In listening to the tape, he heard sounds which indicated that the tape had multiple stops, starts and

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[1] Alyssa also testified about this earlier incident at trial.

erasures. He observed a splice in the tape. Nothing on the tape appeared to be directly related to this case.

About six days after the incident, Alyssa was examined by Nurse Practitioner Marsha Weir, who ran a child abuse clinic at High Desert Hospital. Nurse Wehr did not find any physical evidence of abuse when she examined Alyssa. The likelihood of finding physical evidence of abuse six days after an incident of abuse is low. Nurse Wehr questioned Alyssa about the incident and found that she had information about sexual behavior that a child of her age would not normally have. Her description of the incident was detailed. Alyssa did not disclose a motivation to fabricate the story. As she did with Detective O'Quinn, Alyssa told Nurse Wehr that she had touched appellant's penis.

In his defense, appellant called Los Angeles County Sheriff's Department Criminalist Sean Yoshii. Yoshii had performed tests for blood and semen on a pair of girl's underpants recovered as part of the investigation. The tests were negative. Yoshii did not observe any substance on the underwear consistent with Vaseline.

Discussion

1. Polygraph test request

During appellant's taped interview with police, he repeatedly requested to take a polygraph test. Appellant contends that the trial court erred in permitting the prosecutor redact these requests from the tape and transcript of the interview and present the redacted version to the jury. He contends that this error violated his federal constitutional right to present a defense and to a fair trial. We see no error.

As appellant acknowledges, Evidence Code section 351.1 provides in pertinent part: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or

adult court, unless all parties stipulate to the admission of such results." (Evid. Code, § 351.1, subd. (a).)

Appellant contends that his requests to take a polygraph test were nonetheless admissible pursuant to Evidence Code section 356, which provides that where part of a conversation or writing is introduced by one party, the whole of the conversation or writing may be inquired into by an adverse party if it is necessary to make the conversation or writing understood. We do not agree.

Section 351.1 states that "an offer to take" a polygraph examination is inadmissible "notwithstanding any other provision of law." Thus, section 356 does not provide any exception to section 351.1 (See *People* v. *Lee* (2002) 95 Cal.App.4th 772, 791 [section 351.1 bars collateral use of polygraph evidence]; see also *People* v. *Thornton* (1974) 11 Cal.3d 738, 764 overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668 [suspect's willingness to take polygraph test is without enough probative value to justify its admission].)

We also see no merit to appellant's claim that exclusion of his offer to take a polygraph test violated his Sixth Amendment rights.[2] The U.S. Supreme Court's opinion in *United States* v. *Scheffer* (1998) 523 U.S. 303 in no way invalidates a per se exclusion of polygraph evidence. To the contrary, a majority of eight justices found that per se exclusion of polygraph evidence does not interfere with a defendant's right to present a defense. (*Id*. at pp. 315-318.) The California Supreme Court has relied on *Scheffer* in finding that the exclusion of polygraph evidence does not violate a defendant's constitutional right to present a defense. (*People* v. *Maury, supra,* 30 Cal.4th at p. 413.)

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[2] Respondent contends that appellant has waived his constitutional claim by failing to make an offer of proof that the results of polygraph tests are generally accepted in the scientific community. (See, e.g., *People* v. *Maury* (2003) 30 Cal.4th 342, 414.) Respondent is correct that this is the rule when a defendant seeks to introduce evidence of the results of a polygraph test. This waiver rule does not seem to have been applied where a defendant seeks only to introduce evidence that he offered to take a polygraph test. (See *People* v. *Espinoza* (1992) 3 Cal.4th 806, 816.)

In a related contention, appellant claims that the redaction of his requests to take a polygraph test turned his affirmative denials of guilt into the functional equivalent of adoptive admissions. Appellant points to two specific instances that he claims are the functional equivalent of adoptive admissions.

The first instance was redacted as follows:

Det. O'Quinn: "[They're] gonna say he's flat out lying. He lied—"

Appellant: " -- and um –"

Blank tape

Det. O'Quinn: "-- that's all I'm gonna write is that you didn't touch her. OK?"

Appellant: "I did not touch her, I did not at all."

This can only be understood as an emphatic denial of touching Alyssa. Appellant cannot be reasonably understood in this context as admitting that he lied about touching Alyssa.

The second instance was redacted as follows:

Det. O'Quinn: "Well, she describes that her pants got pulled down – (unintelligible)"

***Blank tape**

Det. O'Quinn: "(unintelligible) - - let me tell you what she said - -"

Appellant: "Ok."

Det. O'Quinn: "Cause you haven't heard that yet."

Appellant: "Ok."

O'Quinn then detailed Alyssa's statements. His remarks were interspersed with "Ok's" from appellant. O'Quinn finished his account by saying: "That's what she describes, ok." Appellant replied: "That's a lie."

Appellant's decision to listen to O'Quinn's full account of Alyssa's statements before stating that she was lying cannot reasonably be understood as agreeing to her statements.

In addition to the statements cited by appellant, we have reviewed the entire original and redacted versions of the interview transcript and see nothing misleading about the redacted transcript. The redacted version shows that appellant repeatedly denied touching Alyssa, and claimed that he was masturbating in the privacy of his room when Alyssa walked in on him. This is the same impression conveyed by the unredacted version.

2. Prior acts of molestation

Appellant contends that the trial court erred in admitting testimony by Alyssa of a prior uncharged act of molestation by appellant which involved Alyssa and her cousin. We see no abuse of discretion.[3]

Evidence Code section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

There is nothing in the plain language of section 1108 which limits evidence of the defendant's sexual offenses to those committed against someone other than the victim in the case or those proved by witnesses other than the victim in the case.

Appellant contends, correctly, that the California Supreme Court has found that Evidence Code section 1108 does not offend constitutional due process guarantees because of the "careful weighing process" required under Evidence Code section 352. (*People* v. *Falsetta* (1999) 21 Cal.4th 903, 916-917.) However, we do not agree with appellant that *Falsetta*, or due process principles, requires "independent sources of

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[3] Respondent contends that appellant has waived this claim by failing to object in the trial court. Although it appears that appellant did not object during Alyssa's testimony, the trial court took pains to point out that appellant did object to the admission of the evidence. The trial court stated: "Certainly, and I want to make sure there's a clear record on this, that 1108 evidence was offered, or came in, I should say, over the defense objection, at least at one point during the course of the trial there was an objection."

evidence" of the uncharged offenses in order for those offenses to be admissible under the weighing process of section 352. The reference to "independent sources" in *Falsetta* is found in the Court's explanation that "the probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense. [Citation.]" (*Id*. at p. 917.) The Court did not thereby establish a rule *requiring* independent sources of evidence.[4]

3. Evidence Code section 1108

Appellant contends that Evidence Code section 1108 violates the due process clause of the United States Constitution by permitting the introduction of propensity evidence and violates the equal protection clause by doing so only in cases of sexual offenses. Appellant acknowledges that the California Supreme Court has rejected a due process claim in *People* v. *Falsetta*, *supra*, 21 Cal.4th at p. 917. He contends, however, that *Falsetta* must be reconsidered in light of *Garceau* v. *Woodford* (9th Cir. 2001) 275 F.3d 769.

Decisions of the Ninth Circuit do not bind this court or the California Supreme Court. (*People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1211.) This court has no ability to reconsider *Falsetta*, or the issues decided by the California Supreme Court in *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Further, *Garceau* does not assist appellant. The finding of a due process violation in that case involved the use of evidence of an uncharged murder to prove the defendant's propensity to commit the charged murder. Nothing in *Garceau* casts doubt on the Ninth

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[4] It would perhaps be more accurate to say that *Falsetta* does not *re*-establish a requirement for independent sources of evidence. California law in the past did prohibit evidence of other offenses committed by the defendant if the only evidence of those offenses was the uncorroborated testimony of the victim. (*People* v. *Stanley* (1967) 67

Circuit's earlier decision in *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018. In that case the Ninth Circuit specifically held that admission of uncharged sexual offenses pursuant to Federal Rules of Evidence, Rules 413 and 414 did not violate the defendant's rights to "due process, equal protection, or any other constitutional guarantee." (*LeMay*, *supra*, 260 F.3d at p. 1031.) Those rules permit the introduction of uncharged sexual offenses in cases in which the defendant is charged with a sexual offense and provide that the uncharged offense may be considered for its "bearing on any matter to which it is relevant."

The Court in *Falsetta* was not faced with an equal protection challenge to section 1108, but noted with approval that the Court of Appeal in *People v. Fitch* (1997) 55 Cal.App.4th 172 had rejected a due process challenge to section 1108 because the Legislature reasonably could create an exception to the propensity rule for sex offenses, because of their serious nature, and because they are usually committed secretly and result in trials that are largely credibility contests. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 918, citing *People v. Finch*, *supra*, 51 Cal.App.4th at 184.) We agree with the Court in *Finch* that section 1108 does not violate equal protection principles.

4. Opinion testimony – Detective O'Quinn

Appellant contends that Detective O'Quinn, who was qualified as an expert on child abuse investigations, was improperly allowed to testify that he had concluded that Alyssa was telling the truth about the allegations against appellant. Appellant has waived this claim by failing to object in the trial court. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140 [failure to object to impermissible expert testimony waives claim of error on appeal].)

Further, assuming for the sake of argument that this claim were not waived, we would see no merit to it. A witness may not testify that a particular person is telling the

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Cal.2d 812, 817.) As appellant acknowledges, this restriction was lifted in *People* v. *Ewoldt* (1994) 7 Cal.4th 380, 407-408.

truth on a particular occasion. (*People* v. *Melton* (1988) 44 Cal.3d 713, 744.) However, in the testimony complained of by appellant, Detective O'Quinn merely testified that Alyssa understood the difference between the truth and a lie. He did not testify he had formed an opinion that she was telling the truth about the incident.

In describing the investigation process, Detective O'Quinn testified: "With younger victims, one of the first things I try to do is establish whether they can qualify for a courtroom testimony type setting, and that generally entails ascertaining if they know the difference between truth versus lies and if they can explain to me what those differences are so that I can generally get a feeling whether they understand the truth; and then ask them later if this is the truth." The prosecutor asked the detective if he had done that with Alyssa, and the detective replied: "Yes."

The prosecutor then asked Detective O'Quinn if he felt that Alyssa understood the difference between telling the truth and telling a lie, and the detective replied: "Yes. I do believe she had a good understanding." The detective continued: "I first asked Alyssa if she knew the difference between truth and lies. She stated she did. She explained to me that the truth was something that was right, and a lie was something that was wrong. [¶] I asked her to give me an example by stating [that] the room which we were in which happened to have white walls, I said, 'What if I told you this, the wall here is black. Am I telling the truth or telling a lie?' And she said, 'That's a lie.' And I said, 'If it's white?' And she said, 'That's the truth.'"

The prosecutor then asked: "Did you go into with her at all anything about whether it's good to tell the truth or bad to tell the truth; good to tell a lie, bad to tell a lie? Did you go into her – did you go into anything like that with her?" Detective O'Quinn replied: "I always try to ascertain or at least ask the question is everything we're talking about today the truth and I did ask that with Alyssa, yes."

The fact that a person knows the difference between the truth and a lie is certainly no bar to telling a lie. Almost everyone who tells a lie understands the difference between the truth and a lie. Detective O'Quinn did not testify that he believed that Alyssa

was telling the truth. And while he did testify that he asked Alyssa if she was telling the truth, he did not repeat her response or state whether he believed her.

5. Opinion testimony – Nurse Practitioner Wehr

Appellant contends that Nurse Practitioner Wehr, who was qualified as an expert on child abuse examinations, was improperly allowed to testify that she had concluded that Alyssa was telling the truth about the allegations against appellant. Appellant has waived this claim by failing to object in the trial court. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1140.)

Further, assuming for the sake of argument that this claim were not waived, we would see no merit to it. In the testimony complained of by appellant, Nurse Practitioner Wehr merely testified about the factors used by medical professionals in evaluating reports of child victims of sexual abuse. She did not testify that she had formed an opinion that Alyssa was telling the truth.

In listing the factors considered by professionals, Nurse Wehr stated: "Well, there are number of things that we look for, whether or not the child has any . . . history of mental health issues, any medications that could affect the child's responses, the child's ability to determine facts from fiction. Whether or not someone else told the child to say something." The prosecutor asked Nurse Wehr: "Anything that you noted during your discussion, during your interview with Alyssa that caused you some concern in that respect?" Nurse Wehr replied: "No." The prosecutor then asked Nurse Wehr if she had observed Alyssa disclose a motivation to lie, and the nurse replied: "No."

At most, Nurse Wehr testified that Alyssa apparently had no history of mental health issues, was not on a medication that could affect her responses, knew fact from fiction, was not told what to say by someone else and did not disclose a motivation to lie. These factors certainly make it more likely that Alyssa was telling the truth, but they do not amount to an opinion by Nurse Wehr that Alyssa was in fact telling the truth.

6. Sufficiency of the evidence

Appellant contends that the evidence is insufficient to support his conviction on Count 1 because Alyssa did not testify that he caused her to touch his penis. There is sufficient evidence to support the conviction.

In reviewing the sufficiency of the evidence, "courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People* v. *Cuevas* (1995) 12 Cal.4th 252, 260-261.)

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citation.]" (*People* v. *Jones* (1990) 51 Cal.3d 294, 314.)

Both Detective O'Quinn and Nurse Practitioner Wehr testified that Alyssa told them that appellant made her rub his penis with her hand. At trial, Alyssa denied touching appellant's penis.

A jury may properly rely on the substance of a witness's repudiated out-of-court inconsistent statement in reaching its verdict, and such a statement is sufficient evidence to support a conviction. (Evid. Code § 1235; *People v. Hawthorne* (1992) 4 Cal.4th 43, 55 fn. 4; *People* v. *Brown* (1984) 150 Cal.App.3d 968, 971.) Thus, Alyssa's repudiated statements to Detective O'Quinn and Nurse Wehr could properly be considered by the jury for their substance. They are sufficient to support appellant's conviction.

Disposition

The judgment is affirmed.

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ARMSTRONG, J.

We concur:

TURNER, P.J.

MOSK, J.